No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALICE GRAY KALES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 32–38) is unreported. The opinion of the Circuit Court of Appeals (R. 43–49) is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 9, 1940 (R. 43). The petition of the United States for a rehearing was denied December 10, 1940 (R. 50). The petition for a writ of certiorari was filed March 8, 1941, and was granted April 28, 1941 (R. 51). The jurisdiction of this Court is conferred by

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In a prior suit concluded 13 years ago, the taxpayer was awarded a large refund of income taxes for the year 1919 resulting from a recomputation of her profit upon her sale in 1919 of certain Ford Motor Company stock. In this suit she seeks an additional refund for the same year based upon a further recomputation of the profit upon the identical shares involved in the prior litigation. The basic question is whether this suit is maintainable and the answer depends upon:

1. Whether the present suit is founded upon a timely claim for refund; that is, whether a certain unsworn letter of March 23, 1925, written by the taxpayer to the collector, even if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

2. Whether that letter, in any event, fails to constitute a claim for refund.

3. Whether the maintenance of this suit amounts to the splitting of a single cause of action, which is not permitted under the statutory scheme for litigating federal taxes; whether, in any event, the maintenance of this suit is forbidden by the cognate principle of *res judicata*.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 44–49.

STATEMENT

This action was brought by the respondent against the United States in the United States District Court for the Eastern District of Michigan, to recover an alleged overpayment of income taxes for the year 1919 in the amount of $195,710.44, with interest (R. 2, 8–13). Upon motion of the United States (R. 26–27), the District Court dismissed the action (R. 38), but its judgment was reversed by the court below (R. 43).

The material facts, as alleged in the amended petition (R. 8–13), with the exhibits attached thereto (R. 13–26), may be stated as follows:

After having obtained from the Collector of Internal Revenue an extension of 30 days from March 15, 1920, for filing her income-tax return for the year 1919, the taxpayer filed her return on March 25, 1920. In that return she disclosed that during 1919 she had sold 525 shares of Ford Motor Company stock at $12,500 per share, and she computed her profit upon the basis of a March 1, 1913, value of $9,489.34 per share, which value was in accordance with a prior determination of the Commissioner of Internal Revenue. The tax shown to be due on the return, in the amount of $1,216,086.26, was paid by the taxpayer to Collector of Internal Revenue Gregan in four installments during the year 1920, on March 25, June 14, September 13, and December 15, 1920, respectively (R. 8–9).

In March 1925 the Commissioner of Internal Revenue redetermined the March 1, 1913, value of the stock to be less than previously determined and, upon the basis of the resultant increased profit from the sale, accordingly made a jeopardy deficiency assessment for the year 1919 against the taxpayer in the amount of $2,627,309.05. This jeopardy assessment was paid by the taxpayer on March 24, 1925, to Collector of Internal Revenue Woodworth, under a letter of protest dated March 23, 1925, addressed to the Collector, a duplicate of which was presented also to the Commissioner of Internal Revenue (R. 10).

The taxpayer's letter of protest of March 23, 1925, consisted of two unnumbered introductory paragraphs, ten numbered paragraphs, and a final unnumbered paragraph (Exhibit B, R. 14–18). The two introductory paragraphs complained generally of the deficiency assessment and stated that the taxpayer protested against it "for the following particular reasons" (R. 14). There followed the ten numbered paragraphs, which asserted the illegality of the deficiency assessment upon specific grounds, the gist of which was that the valuation of the stock originally made by the previous Commissioner could not be reopened for redetermination, and that the deficiency assessment resulting from such reopening and such redetermination of value was therefore illegal and void (R. 14–18). In paragraphs numbered nine and ten the taxpayer

stated further "that if it should be held" that the earlier determination could be reopened, "then" the taxpayer "will" claim an even higher valuation for the stock than that used in her 1919 return as the basis for her original computation of the profit on the sale, and that she "will" claim that she had paid an excessive tax thereon and "will claim the right to a refund of said tax to the extent of such excess" (R. 17–18). The letter concluded with an unnumbered paragraph in which the taxpayer announced that she "will make claim for the refund of the deficiency tax herewith paid" and that, if such refund be denied, "she will bring legal proceedings to recover same" (R. 18).

Accordingly, on June 4, 1925, the taxpayer filed a claim for refund in the amount of $2,627,309.05, which was the amount of the jeopardy deficiency assessment which had been paid under protest on March 24, 1925, to Collector Woodworth. Upon rejection of that claim, litigation ensued in which the taxpayer prevailed. *Woodworth* v. *Kales*, 26 F. (2d) 178 (C. C. A. 6th). In that claim for refund and in the subsequent litigation against Collector Woodworth, the taxpayer contended that the Commissioner of Internal Revenue was precluded from changing the first determination made as to the March 1, 1913, value of the Ford stock in the amount of $9.489.34 per share, and that the jeopardy deficiency assessment

of $2,627,309.05 was illegal and void. That contention was upheld by the District Court and on appeal that judgment was affirmed by the Circuit Court of Appeals on May 10, 1928. Thereafter, on September 24, 1928, the taxpayer filed a judgment claim thereon which, in the amount of $2,627,309.05, plus interest, was satisfied on November 13, 1928 (R. 10–11).

On September 24, 1928, the taxpayer filed a claim for refund (Exhibit D, R. 19–22) which she labelled an "Amendment" to a claim for a refund described as the "claim for refund filed March 24, 1925," which was in fact nothing more than the letter of protest (Exhibit B, R. 14–18) mentioned above. In that "Amendment", the taxpayer sought an additional refund of income taxes for the year 1919 in the amount of $195,710.44, plus interest, upon the ground that the Ford stock had a March 1, 1913, value of $10,000 per share (R. 11).

The Bureau of Internal Revenue refused to make any additional refund to the taxpayer. Following the taxpayer's attempts (R. 22–24) to obtain action upon her "claim," the Commissioner finally wrote her a letter dated June 4, 1935 (Exhibit I, R. 24), in which he referred to what was by her "apparently intended * * * to constitute a claim for refund of $195,710.44 income taxes for the year 1919," called attention to the judgment which had been entered in her favor for

an overpayment of her tax for the year 1919, which judgment had been satisfied, and advised her that the Bureau was therefore precluded "from giving further consideration in any respect" to her income-tax liability for the year 1919. Despite her subsequent effort (Exhibit J, R. 24) to induce the Commissioner to "disallow" her "claim for refund," she was finally advised by the Treasury Department, by a letter dated August 20, 1935 (Exhibit L, R. 25–26), that the "claim for refund" filed in 1925 was merged into the judgment, that she was precluded from filing an "amendment" and, finally, that the Bureau of Internal Revenue had "not considered or treated the so-called amendment as a claim," and that there was therefore no necessity for a disallowance—adding that the adjudication by the court had ended the matter insofar as administrative action was concerned, except to make the refund directed by the judgment (R. 11–12).

On July 7, 1936, the taxpayer instituted this suit in the District Court (R. 2). The United States moved to dismiss (R. 26–27) the amended petition (R. 8–13), asserting: Firstly, that the suit was not founded upon a timely claim for refund, since the letter of protest of March 23, 1925, did not constitute a claim for refund at all and therefore could not be "amended" by the untimely claim filed in 1928, and because, even if the letter of protest were considered a claim, it

had been rejected by the Commissioner's letter of April 6, 1925 (Exhibit C, R. 18); secondly, in the alternative, the action should be dismissed because, even if the letter of protest were considered as a claim, it had become extinguished by virtue of its merger with the judgment in the prior case.

The District Court granted the motion to dismiss (R. 38), holding (R. 32–38) that the letter of protest of March 23, 1925, was not a claim for refund, but merely a protest with a statement of intention later to file a claim upon certain future contingencies, and that it did not constitute an informal or defective claim which could be amended and that hence, since the claim filed in September 1928, was untimely, the action was barred by Section 3226 of the Revised Statutes. Having so concluded, the District Court found it unnecessary to consider the other points raised by the motion to dismiss (R. 38).

On appeal, the court below reversed the judgment of the District Court, holding that the letter of March 23, 1925, constituted an informal claim which was perfected by the formal claim filed in September 1928 and that consequently the taxpayer's cause of action was not barred by limitation (R. 43–49).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the present suit is maintainable.

2. In holding that there was in existence at the time this suit was brought a valid claim for refund which could support this suit.

3. In holding that the taxpayer's letter dated March 23, 1925, constituted a claim for refund.

4. In failing to hold that such letter, even if a claim for refund, was merged with and extinguished by the judgment entered pursuant to the decision of the court below in 26 F. (2d) 178.

5. In failing to hold that such letter, even if otherwise a claim for refund and not extinguished by such prior suit, was fatally defective because of the conditions which the taxpayer specified therein.

6. In failing to hold that the decision in the prior suit in any event foreclosed the maintenance of the present suit.

7. In failing to hold that the taxpayer's cause of action, if she had any, was barred by the statute of limitations.

8. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

1. Every suit for refund must be founded upon a valid claim for refund. Here, the taxpayer's entire case rests upon the March 23, 1925, letter. Even if that letter be treated as an "informal" claim for refund which could be perfected after the expiration of the period of limitations, it was merged with and became extinguished by

the judgment in the earlier litigation. That judgment gave her everything that she sought in the letter.

2. In any event, the letter did not constitute a claim for refund, informal or otherwise, of any of the 1919 taxes originally paid by respondent. It was a letter protesting the assessment of an *additional* tax, with a statement of intention to file a claim for refund thereof; and she in fact did file such a claim for refund on June 4, 1925, which served as the basis for the prior litigation. The central ground of protest in the letter was that the original determination of the Commissioner upon the basis of which she had paid her 1919 taxes could not be reopened by his successor. And in stating that she would seek refund of the additional tax upon that ground, she announced vaguely that she would seek an even more favorable determination than that originally made by the Commissioner if it should be held that the determination could be reopened.

Thus, although respondent did make a timely claim for refund of the additional tax on June 4, 1925, she never filed any such claim for the original taxes which she seeks to recover herein. She did file a document in 1928 which purported to be an amendment of a timely claim, i. e., the March 23, 1925 letter, but that "amendment" was untimely as an original claim and can operate to impart life to the letter only if the letter can be regarded as a claim itself.

That the letter may not be considered a claim seems clear. It contained at most a warning that the taxpayer might file a claim for refund of the additional tax (which she did) together with an alternative suggestion as to what she would contend if her main contention as to the finality of the original determination were rejected. The letter was not a claim for refund of the additional tax, as shown by respondent's own conduct in filing a suitable claim shortly thereafter for the additional tax, and, *a fortiori*, cannot be regarded as a claim for refund of any of the original tax. Although this Court has gone far in permitting untimely amendments of defective claims, it has always insisted that the earlier document must in substance constitute a claim for refund.

The letter was fatally defective as a claim for refund for the further reason that it was conditional. A taxpayer may not keep liability open indefinitely by announcing that refund will be sought if and when any specified contingencies occur. Here, the taxpayer declared that she would seek refund of part of the original tax if it should be held that the original determination of the Commissioner could be reopened.

3. The maintenance of this suit is foreclosed by the prior litigation since tax liability for any one tax year constitutes but a single cause of action which cannot be split. Congress in establishing a comprehensive system of judicial review of in-

come tax matters (in the District Court, the Court of Claims, and the Board of Tax Appeals), could not have intended the remedies to be cumulative rather than alternative, and could not have intended liability for a single tax year to be the subject matter of litigation in more than one forum or of successive litigation in the same forum.

Finally, the cognate principle of *res judicata* forbids the maintenance of this suit.

ARGUMENT

Introductory.—Every suit for refund must be founded upon a valid and timely claim for refund.[1] The 1919 taxes which respondent seeks to recover in this suit were paid in 1920, and the last date within which she could have filed a timely claim was April 14, 1925.[2] She had not filed any such claim before that time, but on September 24, 1928, she filed what purported to be an "amend-

[1] *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141.

[2] The taxes which respondent seeks to recover were paid during the year 1920 (R. 13), and the time within which she could have filed claim for refund was, under Section 284 (b) and (h) of the Revenue Act of 1926 (see Appendix, *infra*, p. 47), four years from the date of payment, or at most, five years from the date the return was due. The return for the year 1919 was originally due on March 15, 1920, and the time was in this case extended by the Collector for 30 days from March 15, 1920 (R. 13), or to April 14, 1920. Accordingly, April 14, 1925, was the last possible day on which respondent could have filed claim for refund of these taxes.

ment" of a claim filed March 24, 1925. The latter was simply an informal unsworn letter of protest with respect to a deficiency assessment, not here involved, and she does not contend that the letter standing alone is a sufficient claim for refund. Her sole contention is that the letter constituted a defective claim for refund which could be and was perfected by the so-called 1928 amendment.

It is our position that this suit is not maintainable for any one of three independent reasons: (1) That even if the 1925 letter were to be considered a claim for refund, it became merged with and was extinguished by the judgment entered pursuant to the decision in 26 F. (2d) 178, with the consequence that this suit is not supported by any claim for refund; (2) that in any event the letter was not a claim for refund at all as shown both by its contents and extrinsic circumstances, that it was not treated as such by petitioner herself, and that it could not be "perfected" by an untimely "amendment"; and (3) that even if the letter were an independent valid claim for refund, not otherwise extinguished by the 1928 judgment, this suit is foreclosed by the earlier litigation, not only because under the statutory scheme for litigating federal taxes Congress did not intend to permit a taxpayer to litigate tax liability piecemeal for any one year, but also because of the doctrine of *res judicata*.

I

EVEN IF THE 1925 LETTER BE CONSIDERED A CLAIM FOR REFUND, IT WAS MERGED WITH AND BECAME EXTINGUISHED BY THE JUDGMENT IN THE PRIOR LITIGATION

1. In this suit respondent seeks to recover 1919 taxes paid by her in 1920. During 1919 she had sold 525 shares of Ford Motor Company stock at $12,500 a share. She had acquired those shares prior to 1913, so that her taxable gain was to be measured from the March 1, 1913, value of the stock. She reported the gain upon the basis of a March 1, 1913, value of $9,489.34 per share, a valuation that was fixed and accepted by the then Commissioner of Internal Revenue.

Thereafter, on or about March 13, 1925, the Commissioner of Internal Revenue determined that the March 1, 1913, value of the Ford stock was considerably less than the amount reported by the taxpayer and previously agreed to by the former Commissioner, and made a jeopardy assessment against her in the amount of $2,627,309.05. She thereupon paid that assessment accompanied by a letter of protest addressed to Fred L. Woodworth, the collector of internal revenue in her district. And since her entire position in this case turns upon that letter, it is important to examine it carefully.

The letter opens with a general paragraph protesting against the deficiency assessment and

states that payment is made under duress (R. 14). The second paragraph states that she protests against the deficiency assessment "for the following particular reasons" (R. 14), and there follow ten numbered paragraphs. In essence the first eight of those numbered paragraphs state that the March 1, 1913, value of the Ford stock previously approved by the former Commissioner of Internal Revenue was final and could not be redetermined. Paragraphs numbered 9 and 10 announce that although the taxpayer insists that the valuation previously accepted "should stand" (R. 17), she will nevertheless contend for an even higher valuation if the issue is one that can be reopened. The letter then concludes with an unnumbered paragraph in which the taxpayer declares that she "will make claim for the refund of the deficiency tax herewith paid and should such refund be denied she will bring legal proceedings to recover same" (R. 18).

In accordance with that declared intention she thereupon did file a claim for refund on June 4, 1925, and brought suit thereon. The court agreed with her contention in that case that the determination of the former Commissioner fixing $9,489.34 as the March 1, 1913, value of the stock could not be reopened, and awarded her a judgment in the amount of the deficiency ($2,627,-

309.05) plus interest. *Woodworth* v. *Kales*, 26 F. (2d) 178 (C. C. A. 6th).[3]

In the instant suit, she seeks an additional refund of $195,710.44 plus interest based upon a March 1, 1913, value of $10,000 per share of the identical shares of Ford stock involved in the prior suit.

2. In Point II, *infra*, p. 18, we will urge that the March 23, 1925, letter upon which this suit is bottomed cannot be considered as a claim for refund at all, and that this suit is therefore fatally defective. At this point, we contend that even if that letter be considered a claim for refund which could otherwise be "perfected" by a subsequent amendment, it became merged with the judgment in the prior litigation and is therefore not available to support the present suit.

As noted above, the March 23, 1925, letter was a letter addressed to the Collector of Internal Revenue, accompanying the payment of the $2,627,309.05 deficiency assessment and it protested against that assessment. The central ground of protest was that the Commissioner had no power to reopen the valuation of the Ford stock since the former Commissioner's acceptance of a valuation of $9,489.34 per share was final.

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[3] It seems clear that her victory in that case was wholly unwarranted, for it has since been repeatedly held that the determination of the Commissioner of Internal Revenue can be reopened at any time. *Burnet* v. *Porter*, 283 U. S. 230; *Commissioner* v. *Newport Industries*, 121 F. (2d) 655, 657 (C. C. A. 7th).

And it is clear from the context of the letter that the taxpayer was concerned only with the deficiency assessment, for she introduced her 10 numbered paragraphs with the statement that she protested against that assessment "for the following particular reasons." Those "following particular reasons" disclosed in substance but one basic contention, namely, that the Commissioner had no authority to reconsider a determination made by his predecessor in office. Paragraphs numbered 9 and 10 merely supplement the main contention by asserting that if the previous determination can be reopened, the taxpayer will seek to establish an even higher valuation. The concluding unnumbered paragraph then states that she will file claim for refund "of the deficiency tax herewith paid" (R. 18).

After having filed a formal claim for refund less than two months later she then brought suit and actually recovered the entire deficiency plus interest, on the sole ground that the Commissioner could not reopen the determination of his predecessor. 26 F. (2d) 178.

The judgment in that prior suit gave the taxpayer everything that she demanded in her letter of March 23, 1925. At most that letter was preliminary or introductory to the June 4, 1925, claim, and her sweeping victory in that litigation was fully responsive to the letter and the June 4, 1925, claim. Therefore, even if the letter might otherwise be regarded as an "informal" claim, it

ceased to have any vitality as such after that litigation and consequently cannot afford any foundation for the present suit.

Thus, the Commissioner properly advised the taxpayer that (Exhibit I, R. 24), in view of the judgment entered in her favor in the amount of $2,627,309.05, with interest, representing an overpayment of her tax for the year 1919, the Bureau was precluded from giving any further consideration to the matter of her income tax liability for the year 1919, and, later, that (Exhibit L, R. 25–26) her claim was merged with the judgment and the judgment removed the matter from the realm of administrative action, except to make the refund directed thereby.

Since the letter of March 23, 1925—even if it were regarded as constituting an "informal" claim for refund—was merged with the judgment in the prior suit, it follows that there remained nothing to which the purported amendment filed in 1928 could attach as an amendment. The 1928 claim was, as already seen, ineffective as an original claim. Therefore, at the time the present suit was brought, there was not in existence a valid claim which could support it.

II

IN ANY EVENT, THE MARCH 23, 1925, LETTER WAS NOT A CLAIM FOR REFUND OF THE TAXES HERE INVOLVED, AND CANNOT SUPPORT THIS SUIT

In Point I we have contended that the judgment entered in the prior litigation was fully re-

sponsive to the March 23, 1925, letter, so that if it is to be treated as a claim for refund it became extinguished by that judgment. However, it seems quite plain, and we so contend here, that the letter was not intended to be nor can it be regarded as a claim for refund of the taxes here involved.

1. Under the regulations then in force, a claim for refund was required to be filed on "Form 843" and to set forth under oath all of the facts relied upon. Article 1306 of Treasury Regulations 65, infra, p. 48.[4] The letter of March 23, 1925, obviously does not fulfill either of those requirements, and is therefore fatally defective, standing by itself, as a foundation for this suit.[5] The taxpayer has not contended otherwise, and rests her sole case upon the untimely 1928 amendment as retroactively imparting life to her so-called March 23, 1925, claim.

It is true that this Court has gone far in permitting taxpayers to "amend" or "perfect"

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[4] This same general requirement of the regulations continued in effect until May 1, 1929, when the requirements were somewhat expanded. T. D. 4265, VIII-1, Cum. Bull. 110, *infra*, p. 49.

[5] While the failure to use the Treasury form may not of itself be significant (see T. D. 4265, VIII-1, Cum. Bull. 110; *Lasher* v. *United States*, 65 C. Cls. 295), the failure to comply with the requirement of the oath is far from unimportant. Thus, in the cognate inquiry as to whether an unsworn return, otherwise complete and in good form, complies with the statutory requirement, this Court has held such to be no return at all for the purpose of starting the running of the period of limitations. *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245.

earlier timely claims by amendments filed after the expiration of the limitations period. But in every such case it was essential that the original document constitute *in substance* a claim for refund of the taxes sought to be recovered. Thus a timely claim, plainly intended as such, may be amended thereafter if it is too general or defective in form. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62. But even that liberal rule has been restricted so as to forbid an untimely amendment introducing new grounds that differ from the specific grounds set forth in the timely claim. *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Gaylatt Oil Co.*, 302 U. S. 528. And the rule permitting an untimely amendment has always rested, even in cases where most liberally applied, upon the assumption that, apart from defects as to form, there had been timely filed what in substance amounted to a claim for refund.[1]

The March 23, 1925, letter in this case was not a claim for refund either in form or in substance, and therefore could not be converted into a claim for refund by an untimely "amendment."

2. The letter was not in substance a claim for

[1] This result is a necessary consequence of the statutory requirement that there be a claim for refund, a requirement that can not be waived, as distinguished from mere requirements as to form which can be waived. Cf. *United States* v. *Gaylatt Oil Co.*, 302 U. S. at 533.

Similarly in the case of returns, the statutory requirement is satisfied only by the filing of what in substance constitutes a return. *Blumsheim Bros. Co.* v. *United States*, 280 U. S. 455; *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 180.

refund of the taxes in controversy. The burning question discussed in the letter was the validity of the deficiency assessment, and the letter contained a vigorous protest against that assessment. But even as to the deficiency assessment the letter did not constitute in substance a claim for refund, for the taxpayer announced that she would thereafter file such claim and in fact did file such claim on June 4, 1925.

The letter protested that the deficiency assessment was invalid because of the finality of the earlier determination. The taxpayer's primary objective was to freeze the earlier determination, an objective that she attained in the litigation which terminated some 13 years ago. Her vague alternative suggestion as to what she would seek if she failed to achieve that primary objective can hardly be viewed as a claim for refund. Certainly, if the letter were not a claim for refund of the deficiency assessment itself, it could scarcely qualify as a claim for refund of the taxes herein. As to the latter, she simply warned the Commissioner that "if it should be held" by any "body having jurisdiction thereof to which this controversy should be submitted," that the earlier determination as to value could be reopened, "then" she "will" claim an even higher valuation and "will claim the right to a refund" of any excess in the tax she had paid originally (R. 17–18). Clearly, that amounted to no more than a warning that she might file a claim in the future.

The error of the court below was in treating that warning as a "clear notice to the Commissioner that * * * she *was* claiming a refund" of part of the original tax. [R. 47–48, italics supplied.] The statements in the letter with reference to the original tax were no more significant or operative as a claim than those made in regard to the additional tax. At most, both merely announced an intention to file a claim. The taxpayer did thereafter file a timely claim for the refund of the additional tax, but she failed to file any claim for refund of the original tax until 1928, when it was obviously too late. This failure to file a timely claim as to the original tax is in effect set to nought by the court below in concluding that the present action is maintainable. The court erroneously viewed the situation as falling under the rule that just as in a pleading, a taxpayer may, in a claim for refund, assert in the alternative two or more inconsistent grounds for refund (R. 48). Here, the taxpayer, at most, asserted in her letter of protest two alternative but nevertheless interdependent grounds upon which she would or might file claims for refund, one as to the additional tax and the other as to the original tax. But, while she later did file her claim for refund as to the one, she failed to file any claim as to the other until it was too late. The lack of such timely claim to "follow up" her warning as to the original tax is fatal to her suit for the recovery thereof.

A protest with a notice that a refund will be sought or a statement of intention to file a claim

has always been considered not to constitute a "claim" which would satisfy the statutory requirement. See *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863, where the Circuit Court of Appeals said (pp. 559, 560):

> The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim * * *.
>
> * * * * *
>
> * * * To allow him [taxpayer] to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. * * *

See also *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d), *Dysart* v. *United States*, 95 F. (2d) 652, 653–654 (C. C. A. 8th), certiorari denied, 305 U. S. 608; *Semmes Motor Co.* v. *United States*, 67 C. Cls. 631, 635–636; *Mutual Trust Life Ins. Co.* v. *United States*, 45 F. (2d) 288, 290 (C. Cls.); *Heberlein Patent Corp.* v. *United States* (S. D. N. Y.), decided March 9, 1938, not officially reported but found in 1938 Prentice-Hall, Vol. 1, par. 5287, affirmed on another point, 105 F. (2d) 965 (C. C. A. 2d); *Waters* v. *United States*, 12 F. Supp. 658 (W. D. Mich.), affirmed per curiam, May 15, 1935, by the court below.

To be sharply distinguished from the instant case is *Bonwit Teller & Co.* v. *United States*, 283

U. S. 258, where recovery was allowed on the theory of an "account stated," i. e., based upon the contractual liability of the United States to make refund of the taxes in the very exceptional circumstances there presented. See *United States* v. *A. S. Kreider Co.*, 313 U. S. 443, 448. Moreover, the *Bonwit Teller* case did not involve a document which on its face disclosed that the taxpayer did not regard it as a demand for refund. And in any event there were also involved certain additional statutory provisions in that case with respect to waivers intended to grant relief to taxpayers which the Court thought should be very liberally construed (283 U. S. at 263). No such provisions are present here.

The decision of the court below, permitting the taxpayer to maintain this action without a genuine timely claim to support it, constitutes a departure from established principles. See *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United Shoe Machinery Corp.* v. *White*, 89 F. (2d) 363, 368 (C. C. A. 1st), certiorari denied, 302 U. S. 768; *United States* v. *Mellon*, 39 F. (2d) 505, 507 (App. D. C.); *McLaughlin* v. *Dean Witter & Co.*, 69 F. (2d) 259, 262 (C. C. A. 9th); *Livermore* v. *Miller*, 94 F. (2d) 111 (C. C. A. 5th), certiorari denied, 304 U. S. 582; *Anderson* v. *United States*, 6 F. Supp. 851 (C. Cls.); *Pine Hill Crystal Spring Water Co.* v. *United States*, 58 F. (2d) 506 (C. Cls.); *International Arms and Fuze Co.* v. *United*

States, 37 F. (2d) 771 (C. Cls.); *Philipsborn* v. *United States*, 53 F. (2d) 133 (C. Cls.), certiorari denied, 285 U. S. 548; *Northwestern Natl. Life Ins. Co.* v. *Willcuts* (Minn.), decided April 11, 1931, not officially reported but found in 1931 C. C. H., Vol. 3, par. 9536; *Pratt & Letchworth Co.* v. *United States*, 1 F. Supp. 745 (W. D. N. Y.); *Peterson* v. *United States* (E. D. Okla.), decided April 10, 1939, not officially reported but found in 1939 Prentice-Hall, Vol. 1, par. 5.418; see also *Balto. & Ohio R. R.* v. *United States*, 260 U. S. 565, and *Savings Institution* v. *Blair*, 116 U. S. 200. Thus, in holding that objections to the assessment of a tax are essentially different from a claim to have it refunded, the Circuit Court of Appeals for the First Circuit stated, in *United Shoe Machinery Corp.* v. *White*, *supra* (p. 368): "The statute clearly contemplates that some *demand* for refund shall be made" [italics supplied]. In *United States* v. *Mellon*, *supra*, the court held that the filing of a so-called "claim," even though on Form 843, did not satisfy the statutory requirement if what was filed was not in substance a claim demanding a refund. In *McLaughlin* v. *Dean Witter & Co.*, *supra*, the Ninth Circuit held that even a closing agreement between a taxpayer and the Commissioner, and a letter by the taxpayer to the Commissioner, were (p. 262) "insufficient to constitute even an informal claim for refund." In *Peterson* v. *United States*, *supra*, the court held that a letter, under oath, protesting against a de-

ficiency, did not constitute an informal claim susceptible of later amendment by an untimely formal claim, because it failed to assert that an overpayment had been made in any aggregate amount and failed to contain any demand for the return thereof. All of the other decisions of lower courts just cited recognize the same principles in a variety of circumstances.

3. Even if the letter were otherwise a proper claim for refund, it is fatally defective because it was conditional.

The court below took the view that the letter "was in the nature of a counterclaim" which "did not mature until the March 1, 1913, value of the stock as previously determined by the Commissioner was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction" (R. 48). Thus, the court treated the letter as a contingent claim, which completely suspended the statute of limitations until some future date when one of the contingencies specified by the taxpayer might occur. And the court apparently treated as such a contingency a subsequent decision of the Board of Tax Appeals in a proceeding to which the taxpayer was a stranger (R. 45, 48).[7] Therefore, the decision of the court below must rest on no more than an assumption that such an unrelated decision gave life to the taxpayer's claim.

If the principle announced by the court below were generally followed, taxpayers would be per-

[7] *Couzens* v. *Commissioner*, 11 B. T. A. 1040.

mitted to suspend the statute of limitations operating against refund claims by mere assertions that they will file claims in the future if and when various contingences occur.[5] Yet it seems clear that the Commissioner should not be forced to consider at his peril every informal assertion to him by a taxpayer as constituting a claim for refund and should not, for obvious reasons, be forced to treat as a claim every declaration made to him of an intention to file a claim for refund upon the happening of any one of a large number of specified contingencies.

Moreover, even if it were possible to recognize a contingent claim, the taxpayer is not aided here. The contingency which she stated was (R. 17) "if it should be held" by the Bureau, by the Board, or by any "other body having jurisdiction thereof to which this controversy should be submitted" that the former valuation could be set aside and reopened and "the contentions of this taxpayer as heretofore set forth be overruled," then the taxpayer would claim an even higher valuation, etc. But the court to which her controversy was submitted, the court below, held that the former valuation could not be set aside and reopened. Therefore, the contingency never arose.

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[5] Moreover, if the decision below is correct, there would have been no necessity for the enactment of Section 608 (b) (2) of the Revenue Act of 1928, 45 Stat. 791, *infra*, authorizing an agreement in writing between the taxpayer and the Commissioner to suspend the statute of limitations until final decision in one or more cases pending either in the courts or in the Board of Tax Appeals.

III

EVEN IF THERE WERE A VALID AND TIMELY CLAIM FOR REFUND, NOT OTHERWISE EXTINGUISHED BY THE PRIOR JUDGMENT, THIS SUIT IS NEVERTHELESS NOT MAINTAINABLE BY REASON OF THAT PRIOR JUDGMENT

In Points I and II we contended that the judgment in the earlier litigation was fully responsive to the letter of March 23, 1925, so that it became extinguished by the judgment, and that in any event that letter could not be regarded as a claim for refund at all. We now contend that even if the letter were a valid claim for refund which had not been fully satisfied by the former judgment, then the earlier litigation nevertheless prevents the maintenance of this suit.

1. Both this suit and the prior litigation involved the respondent's income-tax liability for the year 1919. But it has been firmly established that income-tax liability for any one year constitutes a single cause of action. Thus, in a suit for refund, even against the Collector, a taxpayer is not entitled to recover on the item of overpayment to the extent that it can be shown that there are any other items for the same year, however unrelated and though otherwise barred by the statute of limitations, with respect to which he has underpaid his tax. *Lewis* v. *Reynolds*, 284 U. S. 281. And it has been held in other circumstances that the claim that the income tax for a single year has been overpaid constitutes but one cause of action. *International Curtis Marine Turbine Co.* v. *United States*, 56 F. (2d) 708 (C. Cls.);

American Woolen Co. v. *United States*, 18 F. Supp. 783 (C. Cls.), affirmed on rehearings, 21 F. Supp. 125, 1021, certiorari denied, 304 U. S. 581. Cf. *Guettel* v. *United States*, 95 F. (2d) 229 (C. C. A. 8), certiorari denied, 305 U. S. 603.

The decision below is thus in conflict with the settled principle that a single cause of action may not be split. In *Stark* v. *Starr*, 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. * * *

See also *Grubb* v. *Public Utilities Comm.*, 281 U. S. 470; *United States* v. *California and Ore. Land Co.*, 192 U. S. 355; *Werlein* v. *New Orleans*, 177 U. S. 390; *Nolan* v. *City of Owensboro*, 75 F. (2d) 375 (C. C. A. 6); *Fields* v. *Phila. Rapid Transit Co.*, 273 Pa. 282; *See* v. *See*, 294 Mo. 495. In accord with that principle it has been often held that a judgment in a former suit for refund is a bar to a subsequent suit for refund of taxes for the same year notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Chicago Junction Rys. etc.* v. *United States*, 10 F. Supp. 156 (C. Cls.); *Bowe-Burke Mining Co.* v. *Willcuts*, 45 F. (2d) 394 (Minn.); *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.). See also

Bertelsen v. *White*, 58 F. (2d) 792 (Mass.), affirmed on other grounds, 65 F. (2d) 719 (C. C. A. 1st), and *American Woolen Co.* v. *United States, supra.*

Thus in *Guettel* v. *United States, supra*, an estate tax case, the court said that taxpayers (95 F. (2d) at 231):

> were not at liberty to split up their claim for the recovery of their overpayment of the estate tax, and to prosecute it piecemeal or to present in their first suit only a portion of the grounds upon which they based their claim that the tax had been overpaid, and leave another ground or other grounds to be presented in a subsequent action.

Similarly, in *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.), the court went even further, holding that a former suit against the collector for refund of taxes barred a second suit against the United States for interest. The court said (p. 556):

> a tax and resulting interest are to be treated as constituting a single liability and thus as one cause of action, and not merely an aggregation of separate items of indebtedness. * * *
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> It is fundamental that a single cause of action may not be split up and brought piece-meal, because, otherwise, litigation might be rendered interminable. See *Stark* v. *Starr*, 94 U. S. 477, 24 L. Ed. 276; *Baltimore Steamship Company* v. *Phillips*,

274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Freeman on Judgments, 5th Ed. § 596. This doctrine is equally applicable to tax cases. *Gaetlet* v. *United States*, 8 Cir., 95 F. 2d 229; *International Curtis Marine Turbine Co.* v. *United States*, Ct. Cl., 56 F. 2d 708. * * *

The rule against splitting a cause of action is particularly applicable in the case of Federal income taxes. In providing the machinery for litigating tax matters, Congress has established a comprehensive system of review. It has offered the dissatisfied taxpayer three alternative courses of action: (a) he may seek review of the Commissioner's determination in the Board of Tax Appeals, and thereafter in the appellate courts; (b) he may pay the contested tax and sue the United States for refund, either in the Court of Claims or in the District Court (subject to certain jurisdictional restrictions in the latter); (c) he may sue the collector for refund in the District Court.[9] The very complexity of this machinery

[9] It is perhaps true, as noted by the court below (R. 47), that in her suit against Collector Woodworth, respondent could not have asked for recovery of taxes paid to a predecessor collector. But she certainly could have brought a single suit against the United States for the full amount of any overpayment for the year 1919. That her *remedy* against Collector Woodworth permitted her to recover only on part of her cause of action does not justify splitting the cause of action. Her remedy against the United States was complete, and she should not be heard to complain that she elected to pursue the less desirable course. Cf. *Fields* v. *Phila. Rapid Transit Co.*, 273 Pa. 282, 286: "It matters not that the first suit was brought, as here, in a court of limited jurisdiction."

coupled with the well-established rule against splitting a cause of action makes it highly improbable that Congress could have intended to permit a taxpayer to contest liability for the same tax year in more than one forum or to bring successive suits in the same forum.

2. But wholly apart from the foregoing discussion that a single cause of action may not be split and that Congress, by establishing comprehensive judicial machinery for the review of tax matters, indicated that it did not intend tax liability for one year to be litigated in more than one suit, the maintenance of this suit is forbidden by the cognate doctrine of *res judicata*. The earlier litigation dealt with the basis of the Ford stock, and the refund sought herein turns upon the basis for the identical shares.

The mere fact that the defendant in the former suit was the Collector of Internal Revenue whereas the United States is the defendant herein should make no difference. As pointed out by this Court in *Chicago, R. I. & P. Ry.* v. *Schendel*, 270 U. S. 611, 620, "Identity of parties is not a mere matter of form, but of substance." See also *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120, 121; *Cromwell* v. *County of Sac*, 94 U. S. 351, 360. In *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404, it was held that a coal company's prior litigation with the National Bituminous Coal Commission was *res judicata* in a subsequent action against a collector of internal revenue. And although it has been held that a collector of

internal revenue may be bound by a prior suit against the Commissioner of Internal Revenue on the ground that the Commissioner is the collector's superior officer.[10] The *Sunshine Coal Co.* case rests upon no such narrow basis. The collector and the Coal Commission were completely independent of each other. The important consideration there was that the United States was the real party in interest in both suits, and in determining whether the collector is to be concluded by the earlier litigation the Court stated that "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy" (p. 403).[11] Cf. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284, 285.

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[10] *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620. The question involved in that case and its converse, *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, does not, however, present the true issue of *res judicata* that is involved herein. In those cases the question was the extent to which a suit relating to tax liability for earlier years was conclusive on like issues raised in a suit for later tax years. The problem in those cases really involved an extension of the principle of *res judicata*, an extension that is not universally applied. Cf. *Blair* v. *Commissioner*, 300 U. S. 5. Moreover, those cases have been sharply criticized. See Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1340–1347; Paul, *Selected Studies in Federal Taxation* (Second Series), pp. 104, 124–126.

[11] The Court then briefly distinguished several earlier cases as turning upon the "personal" nature of a suit against a collector. However, the *Sunshine Coal* case itself involved no such distinction, and, as we will attempt to show, *infra*, pp. 34–42, whatever validity there may have been to such a distinction in former times is no longer present.

Thus, we are brought to the pivotal question whether the former suit in this case against the collector was in substance a suit against the Government. In considering this question it will be helpful to examine briefly the historical development of suits against collectors and their present status.

It became established at a rather early date, both in this country and in England, that an action in *indebitatus assumpsit* would lie at common law against a collector in certain circumstances. See *Elliott* v. *Swartwout*, 10 Pet. 137, in which a number of the English cases are collected. It was a fundamental rule in the law of agency that the agent of a known principal could not be held liable for funds which he had transmitted to his principal.[12] But where payment was made to the agent under protest and the agent was given notice not to transmit the funds to his principal, the law implied a promise on the part of the agent to make repayment to the third party. Accordingly, it was held that one who had voluntarily made payment to the collector could not recover where the collector had paid the money over to the Treasury, but that where the collector had been notified not to transmit the funds to the

[12] *Sadler* v. *Evans*, 4 *Burr.* 1984; *Buller* v. *Harrison*, 2 Cowp. 565; *East India Co.* v. *Tritton*, 3 B. & C. 280; *White* v. *Bartlett*, 9 Bing. 378; *Horsfall* v. *Handley*, 8 Taunt. 136, 138; *Hooper* v. *Robinson*, 98 U. S. 528, 540–541; *Baldwin* v. *Black*, 119 U. S. 643, 647.

Treasury, he did so at his peril, giving rise to an implied promise to repay the money illegally exacted. *Elliott* v. *Swartwout, supra.*[13]

As a consequence of that rule, however, a collector might refuse to pay the protested taxes into the Treasury in order to protect himself. The inconvenience thus caused to the Treasury together with the fact that the funds might be jeopardized meanwhile through their use by the collector in personal speculative ventures (see *Barney* v. *Watson*, 92 U. S. 449, 452; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 275), led to the enactment of statutory provisions in 1839 requiring the collector to pay all taxes into the Treasury, irrespective of protest, and providing for the administrative refund of illegally collected taxes by the Secretary of the Treasury (c. 82, 5 Stat. 339).

That legislation thus removed the basis for suits against the collector. Since the collector was now under a duty to pay over the money collected, it was therefore impossible to spell out any implied promise on his part to support an action of assumpsit. This Court so held in *Cary* v. *Curtis*, 3 How. 236, and the reasons which compelled that result were restated with even greater clarity in

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[13] See also *Greenway* v. *Hurd*, 4 Term R. 553; *Campbell* v. *Hall*, 1 Cowp. 204, 205; *Whitbread* v. *Brookshank*, 1 Cowp. 66, 69.

Curtis's Administratrix v. *Fiedler*, 2 Black 461, 478:

> *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were required to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. * * *

See also *Arnson* v. *Murphy*, 109 U. S. 238, 240.

Since that result left the aggrieved taxpayer without any judicial remedy, Congress shortly

thereafter restored the right to maintain suit against the collector, notwithstanding his obligation to pay all taxes into the Treasury. Act of February 26, 1845, 5 Stat. 727. But, beginning with that statute, the suit against the collector was converted into a statutory remedy, and the various statutory provisions, which have been enacted since that time with respect to such suits, have removed all significant resemblance to a common-law suit and have established it beyond question as a statutory remedy. The Court has often recognized that "the common-law right of action against a collector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive" (*Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693). See *Nichols* v. *United States*, 7 Wall. 122, 126–127; *Barney* v. *Watson*, 92 U. S. 449, 452; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Philadelphia* v. *Collector*, 5 Wall. 720, 731–735; *Collector* v. *Hubbard*, 12 Wall. 1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The present status of the suit against the collector was thus summarized by Mr. Justice Cardozo in the *Moore Ice Cream Co.* case (289 U. S. at 382–383):

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser,

> nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics supplied.]

True, in certain circumstances the suit against the collector may retain the outward appearance of a "personal" suit and has at times been characterized as such.[14] But that appearance is purely formal and should not for a moment obscure the fact that the suit is in reality against the United States, that the Attorney General appears on behalf of the defendant (against whom execution will not issue) with full authority, in the language of the *Sunshine Coal Co.* case, "to represent its [United States] interests in a final adjudication of the issue in controversy," 310 U. S. at 403.

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[14] See, e. g., *Patton* v. *Brady*, 184 U. S. 608, 612-615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

That there may be some procedural differences between a suit against the collector and one against the United States is of no significance in determining the true nature of the suit against the collector. Thus, although a suit against the United States in the Court of Claims may have different incidents from a suit against the United States in the District Court, it is nevertheless plain that they are essentially the same. Similarly, the mere fact that the suit against the collector may retain certain of its original formal or procedural aspects is unimportant if it is in essence a suit against the Government. And that it is in essence a suit against the Government has been established beyond serious question in the *Moore Ice Cream Co.* case.

Thus, to the extent that *Sage* v. *United States*, 250 U. S. 33, seems to reach a different result, it is plainly out of line with this Court's more thorough and more recent consideration of the nature of the suit against the collector in the *Moore Ice Cream Co.* case. In any event, however, the *Sage* case is distinguishable in several important respects.

At the very outset it should be noted that the *Sage* case arose under materially different statutory provisions. The death taxes there involved had been collected under an 1898 statute, and a 1902 statute had thereafter directed refund of certain taxes theretofore collected. The claimant

brought suit and recovered judgment against the collector in the amount then thought to be refundable. However, it appeared that judgment should have been in a greater amount, and Congress in 1912 enacted further legislation spelling out the extent of refund in such circumstances. The claimant thereafter brought suit against the United States for the difference, relying primarily upon the newly enacted 1912 legislation. As the Court in the *Sage* case noted, 250 U. S. at 39, "The Act of 1912, like that of 1902, created rights where they had not existed before * * *." Accordingly, the decision in the *Sage* case is supportable upon the ground that the rights which were the subject matter of the second suit had not been the subject of prior litigation. Indeed, the *Sage* case has been regarded at least several times as resting upon the particular legislation there involved.[15] See *Second Nat. Bank of Saginaw* v. *Woodworth*, 54 F. (2d) 672, 673 (E. D. Mich.),

[15] It should be carefully noted that the *Sage* case has no bearing upon our argument, *supra*, p. 31, that Congress did not intend to permit multiple suits, as disclosed by the comprehensive machinery that it has established for litigating tax matters. That issue was never raised in the *Sage* case. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14; *Williams* v. *United States*, 289 U. S. 553, 570; *KVOS* v. *Associated Press*, 299 U. S. 269, 279. Indeed, the issue could not have been fully presented at that time for the Board of Tax Appeals had not yet come into existence.

affirmed, 66 F. (2d) 170 (C. C. A. 6th); *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7). See also Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

The *Sage* case is further distinguishable upon the ground that whatever vital distinctions may then have existed between suits against the collector and suits against the United States have disappeared since that time. Thus, the Court stated (250 U. S. at 37), "The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." At that time interest was allowable on judgments against the collector (cf. *Erskine* v. *Van Arsdale*, 15 Wall. 75), whereas Congress had made no provision for interest in suits against the United States. That difference obviously made it much more attractive to sue the collector than the United States, and probably is in large part responsible for the much larger proportion of suits against collectors at that time. But that discrepancy has since been eliminated by Section 177 of the Judicial Code, as amended by Section 1324 (b) of the Revenue Act of 1921 (42 Stat. 227), Section 1117 of the Revenue Act of 1926 (44 Stat. 9), Section 615 of the Revenue Act of 1928 (45 Stat. 791), and as finally amended by Section 808 of the Revenue Act of 1936 (49 Stat. 1648), so that the provisions

for interest are identical irrespective of whether the defendant is the collector or the United States. As to what the Court in the *Sage* case meant by the difference in the "nature of the defenses open", it is difficult to determine. Although there may be certain formal differences between the two types of suits (see footnote 14, *supra*), there are we believe, no differences of any substance.

Finally, the *Sage* case is further distinguishable in that it was then thought that a judgment against the collector would not necessarily be paid by the United States, depending upon whether he were granted a certificate of probable cause. 250 U. S. at 37. But this Court has since indicated that the collector would be entitled to a certificate of probable cause as of right in such circumstances.[16] *Moore Ice Cream Co.* v. *United States*, 289 U. S. at 381–382.

Accordingly the suit against the collector is in all essential respects a suit against the United States, and judgment in such suit should be *res judicata* in the later suit against the United States just as though the former suit itself had been against the United States.

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[16] See dissenting opinion of Judge Whitaker in *Nunnally Investment Co.* v. *United States*, 36 F. Supp. 332 (C. Cls.), pending upon petition for rehearing on denial of certiorari, No. 990, 1940 Term. See also *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192, 197–198 (C. C. A. 2d), pending on petition for certiorari, No. 327, this Term.

CONCLUSION

The decision of the court below should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RACUM,
HARRY MARSELLI,
Special Assistants to the Attorney General.

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APPENDIX

Revised Statutes:

SEC. 3226 (as amended by Section 1113 (a) of the Revenue Act of 1926, 44 Stat. 9, and Section 1103 (a) of the Revenue Act of 1932, 47 Stat. 169). No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228 (as amended by Section 1112 of the Revenue Act of 1926, 44 Stat. 9). (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed. (U. S. C., Title 26, Sec. 1433.)

In the Revenue Act of 1928, 45 Stat. 878, the following amendment to Section 3228 of the Revised Statutes was made by Section 619:

* * * * *

(c) Section 3228 of the Revised Statutes, as amended by section 1112 of the Revenue Act of 1926, is amended by striking out "except as provided in sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (U. S. C., Title 26, Sec. 1433.)

In the Revenue Act of 1932, 47 Stat. 169, the following amendment to Section 3228 of the Revised Statutes was made by Section 1106:

> (a) Subsection (a) of section 3228 of the Revised Statutes, as amended, is amended by adding at the end thereof the following: "The amount of the refund (in the case of) taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund." (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1926, 44 Stat. 9:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

Revenue Act of 1928, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

* * * * *

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

* * * * *

(2) within such period, the taxpayer and the Commissioner agreed in writing to sus-

pend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. * * *

T. D. 4266, VIII-1 Cum. Bull. 111 (promulgated March 27, 1929):

* * * * *

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

T. D. 4265, VIII–1 Cum. Bull. 110 (1929) (amending Art. 1254 of Treasury Regulations 74, promulgated under the Revenue Act of 1928):

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to appraise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified insofar as they are inconsistent with these regulations.